In the face of all that evidence we found it quite impossible to agree with the learned judge that sick leave with full pay was conditional on prior approval of the union or that it was an implied term of the contract that no salary was payable to the appellant during his absence from work on account of illness. We therefore allowed the appeal with costs here and in the court below, setting aside the order of the learned appellate judge and restoring the judgment of the learned Senior President.

Appeal allowed.

Solicitors: *Skrine & Co.; Aljeffri & Co.*

OOI AH PHUA v. OFFICER-IN-CHARGE, CRIMINAL INVESTIGATIONS, KEDAH/PERLIS

[O.C.J. (Hashim Yeop A. Sani J.) January 13, 1975]
[Alor Star — Originating Motion No. 1 of 1975]

Administrative Law — Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested — Right of subject to consult and be defended by counsel of his choice — Whether denial renders detention unlawful — Federal Constitution, art. 5(3).

In this case the subject had been arrested by the police on December 26, 1974 and after being produced before the Magistrate on December 28, 1974 he was formally charged on January 7, 1975 for abetment in gang robbery. The applicant, the father of the subject, instructed his solicitors and counsel attempted to see the subject but was unsuccessful. Subsequently the applicant applied for a writ of *habeas corpus* and it was alleged that (1) the right of subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial of his right by the police has rendered the detention unlawful.

Held: (1) although under Article 5(3) of the Federal Constitution the person arrested has the right to be informed "as soon as may be" of the grounds of his arrest, the clause does not direct the time when the right of the person arrested to consult and be defended by counsel of his choice begins;

(2) the right of the person to consult and be defended by counsel of his choice should be reconciled with the duty of the police to investigate into the offence and such right should not be exercised to the detriment of such investigation;

(3) in this case the failure of counsel to meet the subject on January 2, 1975 had been satisfactorily explained in the affidavit of the respondent and therefore the application for issue of a writ of *habeas corpus* should be refused.

Cases referred to:-

(1) *Moti Bai* v. *State* A.I.R. 1954 Rajasthan 241.
(2) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.
(3) *Ramli bin Salleh* v. *Inspector Yahaya bin Hashim* [1973] 1 M.L.J. 54.
(4) *Re Madhu Limaye* A.I.R. 1969 S.C. 1014.

ORIGINATING MOTION.

Karpal Singh for the applicant.

Datuk Tunku Mukhtar (Legal Adviser, Kedah/Perlis) for the respondent.

Hashim Yeop A. Sani J.: Subject was arrested by the Police on 26th December, 1974. Due to intervening public holidays subject was brought before the magistrate on 28th December, 1974 under section 117 of the Criminal Procedure Code. On 7th January, 1975 subject was charged in the Magistrate's Court, Alor Star for abetment in an armed robbery alleged to have been committed on 26th December, 1974 *i.e.* the date of the arrest aforesaid. The offence in respect of which subject is charged is punishable under the Firearms (Increased Penalties) Act, 1971 and non-bailable. Subject is now in remand at the Alor Star prison.

Applicant is the father of subject. In his affidavit dated 5th January, 1975 applicant states that he tried to see his son after the arrest but was prevented from doing so by the Police. On 30th December, 1974 he instructed his solicitors and on the same day the solicitors wrote to the respondent to ask if counsel could see subject at 12.30 p.m. the same day (Exhibit AP1 in affidavit). The respondent replied that the time and date was not suitable and stated that any other date or time may be arranged with the OCPD Alor Star (Exhibit AP2 in affidavit). The affidavit further states that on the same day that he sent the letter (AP1) counsel saw the respondent and the 2nd of January, 1975 was fixed as a suitable date for the appointment for counsel to see subject. 2nd of January, 1975 was a Thursday and therefore a half day for government departments in Kedah. Counsel went to the police station at various times in the morning of that day together with applicant and others but neither subject nor the respondent was there. Being a half day counsel returned to his office at 1.30 p.m. He wrote a letter to the respondent (Exhibit AP3) alleging breach of Article 5(3) of the Constitution.

On behalf of the respondent the Deputy Officer in Charge, Criminal Investigations, Kedah/Perlis swore an affidavit dated 8th January, 1975 which states that the applicant made his first attempt to see subject only on 30th December, 1974 (which is denied by the applicant). On 2nd January, 1975 subject was accompanying the police to certain places in Kedah in connection with other police reports and did not return to the police station until 3 p.m. that day. The significant parts of the affidavit are at paragraphs 6 and 10 which state as follows: —

"6. The applicant's solicitor was told by the police on 30.12.74 to the effect that investigation was still in progress but it might be possible for him to see Ooi Chooi Toh on the 2nd of January, 1975."

"10. The police only refused a visit by the applicant's solicitor while Ooi Chooi Toh was under interrogation. After investigation was completed Ooi Chooi Toh was allowed to consult the solicitor."

The proposition submitted by counsel for applicant is simply this: (1) the right of subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial by the police of this right has rendered the detention unlawful. Subject is therefore entitled to release.

Counsel for applicant urged the court to compare this right with the equivalent right under the United States Constitution. In my view it is futile to compare any of the rights protected in Part II of our Constitution to their equivalents under the Constitution of the United States for the simple reason that almost all rights under the Constitution of the United States are in absolute terms whereas under our Constitution

most if not all (except the right with regard to freedom against slavery under Article 6) are in qualified terms.

To begin with it should be noted that Article 5(3) of our Constitution does not introduce an entirely new right but merely re-states a right which had existed in some form before the Constitution. Section 255 of the Criminal Procedure Code (FMS Cap. 6) and section 250 of the Criminal Procedure Code (SS Cap. 21) already granted to "every person accused before any criminal court" the right to be defended by an advocate. Article 5(3) of our Constitution now guarantees this right and at the same time has converted it into a constitutional provision. The equivalent provision is found in Article 22(1) of the Indian Constitution which although stated in negative terms has the same effect as our Article 5(3). The right to consult counsel under Article 22(1) of the Indian Constitution was first mooted in the case of *Moti Bai* v. *State*[1] where Modi J. in his judgment observed that the right of an accused person to consult counsel began since his arrest "though subject to reasonable restrictions as to time and convenience." These "restrictions" were also recognised by Wee Chong Jin C.J. in *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.*[2] where the learned Chief Justice expressed an *obiter dicta* that an arrested person is "beyond a shadow of doubt entitled to this constitutional right granted to him by the authority who has custody of him after his arrest and this right must be granted to him within a reasonable time after his arrest." That the right to counsel should be allowed within a reasonable time after the arrest was also recognised in the "guidelines" of Syed Agil Barakbah J. in *Ramli bin Salleh* v. *Inspector Yahaya bin Hashim.*[3]

To get the correct perspective of Article 5(3) of our Constitution it is important that that clause should be divided into two limbs, *i.e.* the right of a person arrested to be informed of the grounds of his arrest, and the right of a person arrested to consult and be defended by a counsel of his choice. With regard to the first limb the person arrested has a right to be informed "as soon as may be" of the grounds of his arrest which means he should be informed as soon as possible or in the shortest practicable time of the grounds of his arrest. It is seen that although the second limb gives the person arrested the right to consult and be defended by counsel of his choice that clause does not direct the time when this right begins. This is significant because the phrase "as soon as may be" denotes that the right operates forthwith and that the authorities making the arrest shall as soon as possible inform the person the grounds of his arrest. Having regard to the history of Article 5(3) of our Constitution, which is in my view to crystalise into a constitutional provision an already existing right under section 255 of the FMS Criminal Procedure Code and section 250 of the SS Criminal Procedure Code (*i.e.* a right to be defended by an advocate), the true meaning of Article 5(3) becomes clear. In this connection the judgment of Grover J. in *Re Madhu Limaye*[4] is in my opinion relevant. In the course of his judgment Grover J. said of Article 22(1) of the Indian Constitution as follows: —

"The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him."

Like Article 22(1) of the Indian Constitution our Article 5(3) embodies a rule which should be regarded as vital and fundamental for safeguarding personal liberty under rule of law. It is true that the right under the second limb of Article 5(3) does not operate only when he is charged in a criminal court but certainly well before that so as to enable him to prepare his defence. But it cannot certainly be said to operate in all cases simultaneously with the right in the first limb of the clause to be informed of the grounds of his arrest. Such a construction would deprive that clause of its true meaning and purpose. In other words the right of the person under the second limb of that clause should be reconciled with the duty of the police to investigate into an offence under the Criminal Procedure Code so that a proper investigation, and consequently an expeditious trial, can be made possible. A speedy trial is certainly an unwritten right of every person accused of an offence. The right of the person under the second limb of that clause should not be exercised to the detriment of investigation. The authorities concerned must however exercise their discretion in good faith to enable the person arrested to exercise his right under that clause. Since the end of justice is justice and the spirit of justice is fairness then each side should have equal opportunity to prepare its own case fully, freely and fairly before the court. To say differently, to succeed the applicant in a case of this nature must show bad faith on the part of the authorities in denying the exercise of the right of the person arrested, that is, he must show that there is on the part of the authorities a clear and deliberate attempt to obstruct or hinder the person arrested from getting the benefit of counsel to prepare his defence. Each case will therefore be considered on its own merits.

Coming back to the facts of this case there is no evidence that the respondent actually denied the exercise of the right of the subject. What has transpired is simply that investigations were still being carried out not only in respect of the offence alleged in the earlier police report which resulted in the arrest of the subject but also in respect of other police reports with regard to other offences. The failure of the counsel to meet the subject on the 2nd January, 1975 was satisfactorily explained in the affidavit of the respondent.

For the above reasons the application for issue of a writ of *habeas corpus* is refused.

At the end of his submission counsel for the applicant asked that this matter be referred to the Federal Court under section 48 of the Courts of Judicature Act, 1964. Since I am not staying the proceedings and neither was the application by counsel for stay of proceedings, that section does not apply.

Application refused.

Solicitors: *Karpal Singh, Wong & Co.*